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In re: **KNOE-FM, Monroe, Louisiana**
Facility ID No. 48976
File No. BALH-20091006ACZ

KJMG(FM), Bastrop, Louisiana
Facility ID No. 15095
File No. BALH-20091007AAM

**Applications for Assignment of
License
Petition to Deny**

Dear Counsel:

We have before us the above-captioned applications seeking approval for the proposed assignment of license for Station KNOE-FM, Monroe, Louisiana from Radio Monroe, LLC ("Radio Monroe") to Holladay Broadcasting of Louisiana, LLC ("Holladay") (the "KNOE-FM Assignment") and for Station KJMG(FM), Bastrop, Louisiana, from Holladay to KP Music Group, LLC ("KP") (the "KJMG(FM) Assignment") (collectively, the "Assignment Applications"). On November 16, 2009, Opus Broadcasting Monroe, LLC ("Opus"), licensee of Stations KMYYY(FM), Rayville, Louisiana; KQLQ(FM), Columbia, Louisiana; KXRR(FM), Monroe, Louisiana; and KZRZ(FM), West Monroe, Louisiana, filed a Petition to Deny ("Petition") against the KNOE-FM Assignment "and the related sale of KJMG(FM)."¹ For the reasons stated below, we deny the Petition and grant the KNOE-FM Assignment, as conditioned, and the KJMG(FM) Assignment.

¹ Petition to Deny at (i). Radio Monroe filed an Opposition to Petition to Deny on December 1, 2009, and Holladay filed an Opposition to Petition to Deny on December 1, 2009. Opus filed a Reply to Oppositions to Petition to Deny on December 11, 2009.

Background. Holladay is the licensee of Stations KJLO-FM, Monroe, Louisiana; KJMG(FM), Bastrop, Louisiana; KLIP(FM), Monroe, Louisiana; KMLB(AM), Monroe, Louisiana; KRJO(AM), Monroe, Louisiana; and KRVV(FM), Bastrop, Louisiana, all in the Monroe, Louisiana, radio market. The Monroe, Louisiana, radio market has 22 stations. In a market this size, a single entity may own, operate or control up to six stations, no more than four in the same service.² Thus, Holladay currently owns the maximum number of stations permissible in the Monroe, Louisiana, radio market under the Commission’s multiple ownership rule.³ Holladay proposes that its acquisition of Station KNOE-FM be contingent upon the assignment of Station KJMG(FM) to KP, in order to comply with the multiple ownership rule.

Opus makes four assertions in the Petition: (1) Under the Commission’s equity-debt-plus (“EDP”) rule,⁴ Holladay would continue to have an attributable interest in Station KJMG(FM) after the proposed assignments are consummated, in violation of the multiple ownership rule; (2) the filing by Holladay of a lawsuit in Louisiana state court against Opus seeks to punish Opus for participating in the Commission’s processes and brings into question Holladay’s qualifications to be a Commission licensee; (3) grant of the Assignment Applications would harm listeners and advertisers and is not in the public interest; and (4) allegations made by Opus in a pleading filed with the Enforcement Bureau on November 14, 2007, render Holladay unqualified to be a Commission licensee.

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”), requires a two-step analysis for judging the adequacy of Opus’ Petition.⁵ We must first determine whether Opus has made specific allegations of fact that, if true, would demonstrate that grant of the Assignment Application would be *prima facie* inconsistent with the public interest. These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.⁶ If the specific allegations make a *prima facie* case, we next examine and weigh the evidence presented, to determine “whether the totality of the evidence arouses a

² See 47 C.F.R. § 73.3555(a)(1)(iii).

³ 47 C.F.R. § 73.3555(a).

⁴ The EDP rule provides that the holder of an equity or debt interest in a broadcast station shall have that interest attributed to it for ownership purposes if: (1) the debt interest exceeds 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of the station; and (2) the interest holder also holds an interest in a broadcast station operating in the same market that is subject to the multiple ownership rule. See 47 C.F.R. § 73.3555, Note 2(i).

⁵ 47 U.S.C. § 309(d)(1).

⁶ *Id.*

sufficient doubt on the point that further inquiry is called for.⁷ We must also determine whether grant of the Assignment Applications would serve the public interest.⁸

Attribution in KJMG(FM) from EDP. The September 23, 2009, Asset Purchase Agreement (“APA”) submitted with the KJMG(FM) Assignment⁹ provided for a purchase price of \$700,000 for Station KJMG(FM).¹⁰ The APA further provided that Holladay would finance the entire \$700,000 purchase price, with Holladay retaining a first priority lien on the Station KJMG(FM) assets. The Petition asserts that this arrangement would leave Holladay with a post-transaction attributable interest in Station KJMG(FM) under the EDP rule.¹¹ Subsequently, Holladay and KP filed a First Amendment to Asset Purchase Agreement (“APA Amendment”), which was executed on November 30, 2009. The APA Amendment provides that: (1) Holladay will be paid the \$700,000 purchase price in cash at closing; (2) KP intends to borrow funds to pay the \$700,000 cash at closing from the Community Trust Bank (the “Bank”) in Monroe, Louisiana; and (3) Holladay, or Robert Holladay, the sole member of Holladay, “shall provide an unsecured guarantee of Purchaser’s obligations under such loan.”¹²

The Commission has specifically stated that loan guarantees will trigger the EDP rule only to the extent that the guarantor provides security for the loan.¹³ In adopting this policy, the Commission explained that it was doing so in order “to establish, so far as possible, a bright-line test that avoids the uncertainty of case-by-case review.”¹⁴ We find that, because the APA Amendment provides that the loan guarantee will not be secured by any collateral, there would be no post-transaction attribution of Station KJMG(FM) to Holladay or Robert Holladay arising from the EDP rule.¹⁵ Opus notes, however, that the

⁷ *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). See also 47 U.S.C. § 309(d)(1) (“The petition shall contain specific allegations of fact sufficient to show that . . . grant of the application would be *prima facie* inconsistent with [Section 309(a)]. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.”); 47 C.F.R. § 73.3584(b).

⁸ *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). See also *Rocky Mountain Radio Co., LLP*, Memorandum Opinion and Order, 15 FCC Rcd 7166, 7167 (1999).

⁹ KJMG(FM) Assignment Application, Exhibit 4.

¹⁰ APA, Section 2.3.

¹¹ See 47 C.F.R. § 73.3555, Note 2(i).

¹² APA Amendment, Section 2.3.

¹³ See *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 1097, 1112-13 (2001) (Commission will include any security deposit or financial contribution made by a guarantor for the guarantee of a loan in determining whether the guarantor’s interest is attributable under the EDP rule).

¹⁴ *Id.*

¹⁵ On October 6, 2010, the staff sent a letter to Holladay and KP (“Inquiry Letter”) in order to determine if there are any additional agreements concerning the loan to be provided by the Bank per the amended APA. The Inquiry Letter requested information concerning any agreement among or between Holladay, Robert Holladay, KP, and the Bank pertaining to the loan. Counsel for Holladay responded by letter dated November 3, 2010. On November 17, 2010, Opus filed a responsive Supplement to Petition to Deny. On December 21, 2010, Holladay filed an Opposition to Supplement to Petition to Deny, and KP filed a Response to Supplement. After review of the

post-Petition amendment of the APA reflects “that the deal as initially structured was inconsistent with the Commission’s multiple ownership rules,”¹⁶ and that Holladay’s initial certification of compliance¹⁷ was therefore incorrect. The post-petition amendment of the APA is not prohibited, and we note that the declaration of Robert Holladay attests to no intent to falsely certify.¹⁸ Accordingly, we find that there is no evidence of any intent by Holladay to falsely certify rule compliance. However, Holladay is reminded of the importance of accuracy in its certifications to the Commission, and is cautioned to exercise diligence to ensure the accuracy of any future certifications to the Commission.

Civil Lawsuit Filed by Holladay Broadcasting. On November 12, 2008, Holladay filed a civil action in the Fourth Judicial Court for Ouachita Parish, Louisiana, against Opus and three of its employees, alleging defamation and the making of false statements.¹⁹ Holladay’s allegations were based on statements made in filings submitted to the Commission by Opus and the individual Opus employees, contesting the 2007 assignment of Station KNOE-FM from Noe Radio Enterprises, LLC to Radio Monroe.²⁰ Opus contends that the suit was filed “[w]ith no purpose other than to punish the parties,”²¹ and that the allegations made by Holladay in the suit are completely without foundation. Holladay responds that the suit was not filed for the purpose of retaliation, but because Robert Holladay believes that he has a cause of action under state law, which entitles him to damages. Holladay further notes that in filing the suit its counsel certified that the action was not filed for any improper purpose such as to harass the defendants. In letters submitted to the Commission on April 5, 2010, and June 1, 2010, Holladay reports that on March 19, 2010, the trial court denied Opus’ Special Motion to Strike the suit and that the Second Circuit Court of Appeals of the State of Louisiana denied Opus’ appeal of that ruling on May 20, 2010.

Under long-standing Commission policy, we will consider any judgment rendered by a local court,²² but we leave the litigation of civil matters to the Louisiana court.²³ This is not to say, however, that the Commission is unconcerned where a threat or actual filing of a retaliatory civil action could

information provided in these filings, we confirm that there would be no post-transaction attribution of Station KJMG(FM) to Holladay or Robert Holladay arising from the EDP rule.

¹⁶ Reply at 6.

¹⁷ KJMG(FM) Assignment Application, Section III, Question 6(b).

¹⁸ See Opposition at 4; Exhibit G (Declaration of Robert Holladay).

¹⁹ *Robert Holladay and Holladay Broadcasting of Louisiana, LLC v. Opus Broadcasting Monroe, LLC, Michael Downhour, Chris Zimmerman and Barbara Dawson Monk*, 08-4134 (Fourth District Court, Ouachita Parish, Nov. 12, 2008).

²⁰ File No. BALH-20071005ABA. The Commission granted the assignment on May 1, 2008.

²¹ Petition at 13.

²² See, e.g., *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-132 (1945); *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548 (1985).

²³ *Listener’s Guild, Inc. and Classical Radio for Connecticut, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (recognizing Commission’s long-standing policy of refusing to adjudicate private contractual claims for which a forum exists in state courts).

possibly discourage access to the Commission. We have cautioned licensees to exercise discretion, so as to not cast a chilling effect on those parties deciding to exercise their right to file petitions.²⁴ Opus' claim that Holladay's lawsuit has no basis in law, and was filed only to punish the parties, is unconvincing. We note that Holladay, as do all individuals, has the right to pursue any legal remedies at its disposal.²⁵ Thus, based on the record before us, we find that Opus has failed to present a substantial and material question of fact on this issue concerning Holladay's qualifications to be a licensee, or whether grant of the Assignment Applications would serve the public interest.

Grant of the Assignment Application Would Harm Listeners and Advertisers. Opus' only support for its assertion that grant of the Assignment Application would harm listeners and advertisers is that Holladay currently has a 54.3 percent share of market revenue in the Monroe, Louisiana market.²⁶ Opus surmises that grant of the Assignment Application would increase that share, but provides no data to support its assertion. Holladay contests this contention, noting that BIA annual revenue estimates show that Station KJMG(FM) had greater revenues than Station KNOE-FM in 2008. We need not resolve this dispute, given that the current multiple ownership rule uses numerical limitations, rather than revenue share, to determine compliance. When it adopted its bright-line, geography-based radio rule for rated markets, the Commission concluded that "[b]y applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest."²⁷ Opus provides no basis to deviate from our regular application of this rule. Accordingly, we find that Opus has failed to present a substantial and material question of fact on this issue to demonstrate that grant of the Assignment Applications would be inconsistent with the public interest.

Issues Previously Raised by Opus. On November 14, 2007, Opus filed a Request for Investigation and Termination of Illegal Joint Operations ("Complaint") with the Commission.²⁸ The Petition incorporates the allegations against Holladay previously raised in the Complaint. The pertinent allegations concern two stations in the Monroe, Louisiana, market within which Opus asserts that Holladay held impermissible attributable interests. These stations are KMLB(AM) (formerly KNOE(AM)), Monroe, Louisiana, and KBYO-FM, Farmerville, Louisiana.

²⁴ See, e.g., *Patrick Henry*, Order, 69 FCC 2d 1305 (1978); *Fort Collins Broadcasting*, Memorandum Opinion and Order, 38 FCC 2d 707 (1972) ("*Fort Collins*").

²⁵ See *Fort Collins*, 38 FCC 2d at 712 (Commission did not add disqualifying issue, finding that the licensee threatening suit believed in good faith that its antagonist had civilly wronged it and could properly seek private legal redress); *Alliance Broadcasting of Champaign County*, Decision, 5 FCC Rcd 1588 (Rev. Bd. 1990) (filing of collateral lawsuit is not *per se* grounds for questioning applicant's basic character qualifications).

²⁶ *Id.* at 17.

²⁷ *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules*, Report and Order and Notice of Proposed Rulemaking, 18, FCC Rcd 13620, 13813 (2003), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005). See also *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (lifting stay with respect to new local radio ownership rule).

²⁸ On November 16, 2009, Opus filed a Supplement to Pending Request for Investigation and Termination of Illegal Joint Operations with the Enforcement Bureau, which included a copy of the Petition against the Assignment Applications.

KMLB(AM) (formerly KNOE(AM)). On December 13, 2006, an application was filed with the Commission seeking approval of the assignment of Station KMLB(AM), Monroe, Louisiana, (which at that time bore the call sign KNOE(AM)) from Noe Corp. LLC to Holladay.²⁹ In that application, Holladay first informed the Commission that it had commenced a time brokerage agreement (“TBA” or “LMA”) with Station KMLB(AM) on December 1, 2006. Commission rules provide that the LMA gave Holladay an attributable interest in Station KMLB(AM).³⁰ Opus asserts that Holladay’s interest in Station KMLB(AM) was an impermissible attributable interest in the Monroe, Louisiana, market, because at that time Holladay was already the licensee of six stations in the Monroe market, the maximum number permitted by the multiple ownership rule.³¹ The conditional grant of the Station KMLB(AM) assignment required Holladay to surrender the license for the station that at the time bore call sign KMLB(AM) (“Old KMLB”), Monroe, Louisiana, prior to Holladay consummating its acquisition of KMLB(AM).³² Old KLMB was a “paired” lower AM band station, licensed to Monroe at 1440 kHz, which was associated with expanded AM band Station KRJO(AM) at 1680 kHz.³³

On March 4, 2008, Holladay surrendered the authorization for Old KMLB and simultaneously consummated its acquisition of Station KMLB(AM). Holladay asserts that it held a good faith belief that the attributable interest it acquired in Station KMLB(AM) pursuant to the LMA, prior to its surrender of the authorization for Old KMLB, was permissible in light of the grant of its STA authority. This position was articulated by Holladay in the June 14, 2007, petition for reconsideration of the conditioned grant of Station KMLB(AM). Additionally, Holladay claims that it received informal advice from a Commission staff member that its position on this matter was correct. However, it is well settled that informal staff advice is not authoritative, and that a licensee assumes the risk of relying on such advice.³⁴ Moreover,

²⁹ File No. BAL-20061213AIW.

³⁰ 47 C.F.R § 73.3555, Note 2(j)(1).

³¹ The stations owned by Holladay at that time were: KJLO-FM, Monroe, Louisiana; KJMG(FM), Bastrop, Louisiana; KLIP(FM), Monroe, Louisiana; Old KMLB, Monroe, Louisiana; KRJO(AM), Monroe, Louisiana; and KRVV(FM), Bastrop, Louisiana.

³² As discussed above, the station referenced as Old KLMB has not been an authorized facility since March 4, 2008. The former station’s Facility ID No. was 48638. Because another station (Facility ID No. 35249) currently uses the KMLB(AM) call sign, we refer to the station that formerly used that call sign as Old KLMB, in an effort to provide the greatest possible clarity.

³³ Under Note 9 to Section 73.3555 of the Commission’s Rules (the “Rules”), AM expanded band stations are not counted for multiple ownership purposes. Pursuant to Note 10 to Section 73.3555, this authority for joint ownership runs for five years from the grant of the license for the AM expanded band station. KRJO(AM) was granted a license on August 28, 2001. Accordingly, the five-year period was scheduled to expire on August 28, 2006. On July 27, 2006, Holladay requested special temporary authority (“STA”) to continue the joint operation of Old KMLB and KRJO(AM). *See* Reply, Exhibit 1 at 2. Holladay’s STA request specifically requested that the joint operations of these stations be exempted from counting separately for purposes of the Commission’s ownership rules. On August 29, 2006, the staff granted the STA request, effective until March 1, 2007. *Id.* That grant specifically extended Section 73.3555 Note 10 authority for joint operation of those stations. On February 14, 2007, Holladay timely filed a request to extend the STA authority. This STA extension request was not acted on, and became moot with the subsequent surrender of the Old KMLB authorization.

³⁴ *See, e.g., State of Oregon*, Memorandum Opinion and Order, 11 FCC Rcd 1843 (1843); *Texas Media Group, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 2851 (1990).

Holladay withdrew its petition for reconsideration before any determination was made as to the merits of its argument. Based on the totality of the circumstances, however, and in particular Holladay's ultimate surrender of the Old KMLB license, we find that Opus has failed to present a question of fact on this issue concerning Holladay's qualifications to be a licensee.

KBYO-FM. Throughout the period at issue, Station KBYO-FM was licensed to Union Broadcasting Company, Inc. The record indicates that Ness Sound ("Ness") sold advertising time and provided programming to Station KBYO-FM, Farmerville, Louisiana, from approximately August 1, 2006, until approximately April 30, 2008.³⁵ Cynthia Holladay was Ness's sole owner during this period. She was also Holladay's former General Sales Manager and Robert Holladay's former wife,³⁶ and she also sold advertising time and provided programming³⁷ on four Holladay-owned stations³⁸ pursuant to an unwritten joint sales agreement ("JSA").³⁹ Opus states that Station KBYO-FM and the four Holladay stations shared some of the same on-air talent and production employees, that Station KBYO-FM operated from the same building in which Holladay was located, and that sales people sold time for both Station KBYO-FM and the Holladay stations, using common promotional material. Additionally, Opus alleges that Cynthia Holladay attended sales meetings with Holladay staff while she operated Ness.⁴⁰

Holladay does not contest the assertion that on-air and production employees worked at both Station KBYO-FM and the four Holladay-owned stations, that Ness employees sold advertising time for both entities, or that Holladay allowed Ness to operate from the Holladay studio building, where the Station KBYO-FM studio was also located. Holladay emphasizes, however, that Station KBYO-FM was in a separate area, the station had its own employees and telephone lines, and the Station KBYO-FM and Ness operations were conducted separately from Holladay operations.⁴¹ Holladay further states that its JSA with Ness was not required to be in writing, because neither Ness nor Cynthia Holladay was the licensee of any radio station in the Monroe market.⁴² Holladay avows that "at no time did Holladay Broadcasting sell any air time, or provide any programming, to KBYO-FM."⁴³ Finally, Cynthia Holladay claims that, "while operating Ness and performing under the JSA, I did not attend sales meetings among the Holladay sales staff."⁴⁴

³⁵ See Opposition, Exhibit B (Declaration of Cynthia Holladay).

³⁶ Robert and Cynthia Holladay were divorced approximately 12 years ago, long prior to Cynthia's involvement with Ness. See Opposition at 8, n. 12.

³⁷ *Id.*

³⁸ The four stations were: KLIP-FM, KJLO-FM, KMLB(AM) (which, at that time, used the call sign KNOE(AM)), and Old KMLB.

³⁹ See Opposition at 8, n. 13.

⁴⁰ Complaint at 22.

⁴¹ Opposition at 8-10.

⁴² See *id.* at 9.

⁴³ *Id.* at 9.

⁴⁴ *Id.*, Exhibit B.

Opus fails to demonstrate that Holladay exercised control of Station KBYO-FM through either Ness or Cynthia Holladay, as determined by the traditional areas of station operation used to establish control: programming, personnel, and finances.⁴⁵ Nor does Opus provide evidence that Holladay directly exercised control of Station KBYO-FM through any agreement concerning the operation of that station. Moreover, Holladay unambiguously denies any control of Station KBYO-FM, and also asserts that at no time did Holladay or any Holladay employee sell any advertising or provide programming to Station KBYO-FM.⁴⁶ Thus, Opus' assertions fail to establish a basis for attributing Station KBYO-FM to either Robert Holladay or Holladay, during the time period at issue.

In light of this conclusion, Opus has failed to present a substantial and material question of fact concerning the operation of Station KBYO-FM sufficient to demonstrate that grant of the Assignment Applications would be inconsistent with the public interest. We do, however, caution Holladay to ensure that all future brokering agreements it enters into, including JSA's, comply with all Commission rules and policies. Finally, we note that this terminates our consideration of matters raised by Opus in the Complaint.

Conclusion/Actions. Based on the above, we find that Opus has not raised a substantial and material question of fact warranting further inquiry. We further find that Holladay Broadcasting of Louisiana, LLC is qualified to hold the Station KNOE-FM license; that KP Music Group, LLC is qualified to hold the Station KJMG(FM) license; and that grant of the Assignment Applications is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Opus Broadcasting Monroe, LLC IS DENIED, and that the application for approval to assign the license for Station KJMG(FM), Bastrop, Louisiana, (File No. BALH-20091007AAM) from Holladay Broadcasting of Louisiana, LLC to KP Music Group, LLC IS GRANTED; and that the application for approval to assign the license for Station KNOE-FM, Monroe, Louisiana (File No. BALH-20091006ACZ) from Radio Monroe, LLC to Holladay Broadcasting of Louisiana, LLC IS GRANTED, subject to the following condition:

Grant of this application is subject to the prior or concurrent consummation of the transaction proposed in BALH-20091007AAM.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁴⁵ See, e.g. *Secret Communications II, LLC*, Memorandum Opinion and Order, 18 FCC Rcd 9139, 9145 (2003) (Commission looks to who controls policy for programming, personnel, and finances when ascertaining control of a station); *WPGR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142 (1995).

⁴⁶ Opposition, Exhibit G.